

ПРАВНИ ФАКУЛТЕТ У НОВОМ САДУ  
NOVI SAD FACULTY OF LAW SERBIA

# ЗБОРНИК РАДОВА

COLLECTED PAPERS

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# **ЗБОРНИК РАДОВА**

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## THE PRINCIPLE OF MUTUAL RECOGNITION IN THE INTERNATIONAL COOPERATION IN CRIMINAL MATTERS<sup>1</sup>

### *Negative function*

The principle of mutual recognition in connection with criminal law and criminal procedure law, historically has appeared among the legal provisions of international cooperation in criminal matters. It can be stated – in a retrospective view from today –, that the principle functioned in *a negative way*: the requirement of double incrimination means the non-recognition of the foreign legislature's decision about the necessity of punishment, in other words the double incrimination means *the denial of mutual recognition*. Even, if it was not called to be eliminated on the stage of generally accepted legal customs and legal regulation for a while, jurisprudence had appreciated the possible success of the principle already in the early days.<sup>2</sup> In the development of extradition law and the regulation of international legal assistance in criminal matters respectively, the requirement of double incrimination had the central role<sup>3</sup>. Only in the case of the European Union, the latest legal achievements of the third pillar relativize its importance but obviously only between the Member States of the European Union.

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<sup>1</sup> Special thank to Ms. Andrea Törő for her engagement in preparing the translation of the article.

<sup>2</sup> 1880 Oxford Decisions. (Institut de Droit International); Franz von Liszt: Sind gleiche Grundsätze des internationalen Strafrechtes für die europäischen Staaten anzustreben und eventuell welche? Strafrechtliche Aufsätze und Vorträge. I. (1882) 123.p. Liszt, Franz von: In: Strafrechtliche Aufsätze und Vorträge. I. 90-125.p. (1882)

<sup>3</sup> Braum, Stefan: Das Prinzip der gegenseitigen Anerkennung. Historische Grundlagen und Perspektiven europäischer Strafrechtsentwicklung. Goldammer's Archiv. 2005/4. 681-699.p.

### *Mutual recognition of punishability or impunity?*

The principle of mutual recognition *does not take a clear stand* on the question of punishability or impunity, it calls only for the execution of the concrete (foreign) decision in the legal framework of mutual cooperation in criminal matters between the Member States. It means that, if a state on account of physical circumstances can not enforce its decision for example because the accused has escaped to abroad or the evidences are abroad or the witness lives in a foreign country (etc.) – the other state renders help, without supervising the decision in all details. Only the formal obstacles of the cooperation can be supervised, the main issues (the existence of criminal responsibility) of the foreign criminal proceedings should remain untouched.

However, the principle of mutual recognition in connection with criminal decisions may have such ‘side effects’ that could have truly influence the substantive law-regulation. Therefore these ‘side effects’ demand separate examination in cases where the substantive-law regulations are different in the cooperating states. If the crime is the same but the legal provisions are not, there are two *theoretical* alternative on the functioning of the principle of mutual recognition. On the one hand, one state should admit this action as a crime, even if it is not considered to be a crime under domestic law provisions (mutual recognition of punishability); or in the other hand the requesting state should admit impunity under the law of the other state and accept the non-execution of its request based on the own punishability (mutual recognition of impunity). It is evident in case of such *collision* one option should take priority in order to ensure the purpose of correct functioning of this principle. If impunity is granted preference, we ignore the action committed in the other state and open widely the doors of criminal forum shopping. If it is punishability that is given priority, we force the state to do something against its protected social values. According to some literary opinions, the latter method can not be accepted since the states extend the scope of their criminal law particularly over actions committed abroad. The principle of mutual recognition might seem to be surprising or arbitrary<sup>4</sup> in such situation. Moreover, it could be deemed to be a type of ‘state terrorism’, as the state performs the handing over of – under its own domestic law – innocent citizens<sup>5</sup>. Nevertheless, the individual is getting to be a more important part of the international criminal cooperation (so called three-dimensional model<sup>6</sup>), due to the increasing protection of (individual) human

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<sup>4</sup> Vogel, Joachim: Licht und Schatten im Alternativ-Entwurf Europäische Strafverfolgung. Zeitschrift für die gesamte Strafrechtswissenschaft 2004/2 411.p.

<sup>5</sup> Schünemann, Bernd: Fortschritte und Fehlritte in der Strafrechtspflege der EU. Golt-dammer's Archiv 2004/4 203.p.

<sup>6</sup> Lagodny, Otto: Grundrechte als Auslieferungsgegenrechte, Neue Juristische Wochenschrift 1988, 2146.p.



rights. The main function of the cooperation is still the assistance for enforcement of criminal power of the other state. Consequently the – natural – individual interest of not being able to be punishable (for example the accused has escaped into a country, where the law does not criminalize the given behavior) cannot have priority before this main function. At the same time, during the procedure of the international cooperation based upon mutual recognition the protection of individual rights and interests must play a significant role.

## **The principle of mutual recognition in the EU-law**

### *In the law of the international cooperation in criminal matters*

#### **Mutual recognition of decisions**

The principle of mutual recognition in connection with cooperation in criminal matters is more and more gaining ground, parallel with the weakening of double incrimination in EU law. The European Council proclaimed in Tampere (15-16 October 1999) that the principle of mutual recognition should become the cornerstone of judicial cooperation also in criminal matters in the EU – the proclamation of the Presidency Conclusions lead to this ‘dramatic’ change<sup>7</sup>.

The framework-decision on the European Arrest Warrant<sup>8</sup> has recognized this new attitude for the first time as a positive legal provision.<sup>9</sup> The base of the extraditing (surrendering) procedure is the arrest warrant issued in another Member State which involves the request for the surrender of the individual for purpose of a criminal procedure or execution of imprisonment in another state. The extradition request was replaced also terminologically<sup>10</sup> by the European Arrest Warrant with the so-called surrender process. The principle of mutual recognition is effective the following way: in case of certain crimes there is no need for double incrimination, the executing state – subsequent to the examination of the

<sup>7</sup> Ligeti, Katalin: Mutual recognition of financial penalties in the European Union. *International Review of Penal Law* 77 1-2/2006 140.p.

<sup>8</sup> 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal L* 190, 18/07/2002 1-20.p.

<sup>9</sup> See Alegre, Susie / Leaf, Marisa: Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant. *European Law Journal* 2004/10 200-217.p.; Peers, Steve: Mutual recognition and criminal law in the European Union: has the Council got it wrong? *Common Market Law Review* 2004/41 5-36.p.

<sup>10</sup> Although there are some legal systems, where this terminological difference does not exist, f. e. in Germany, where the „traditional” word of extradition (Auslieferung) is used for the surrender in the domestic legislation.

obstacles – proceeds automatically in compliance with the decision, namely the European Arrest Warrant.

The following EU legislations granted mutual recognition to other decisions of domestic authorities, such as in the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime<sup>11</sup>, Framework Decision on the execution in the European Union of orders freezing property or evidence<sup>12</sup>, Framework Decision on the application of the principle of mutual recognition to financial penalties<sup>13</sup> or the Framework on the application of the principle of mutual recognition to confiscation orders<sup>14</sup> – the principle of mutual recognition became the central element in the development of EU criminal law.<sup>15</sup>

Generally speaking, due to the characteristic of this whole procedure, the principle can not get across in its entirety in today's circumstances therefore the process is *reversed*. That means that at this stage is not yet place for a general acceptance of the principle (including every national decision in criminal matters), there are only *some type* of decisions over which the mutual recognition was accepted. It can be labeled as a fragmental acceptance of the principle. Despite this non-totality the ongoing progressive legislation in the EU promises the true expansion and the general acknowledgement of the mutual recognition regarding criminal decisions of all type and might achieve the ultimate target, 'the free movement' of judicial decisions (in criminal matters).

*As a partial result* it can be laid down as a fact that the principle of mutual recognition has the following objective: the decisions passed under different law systems of the Member States during the execution in another Member State have to *share the legal attributes* of decisions passed under its domestic law, i.e. they should not be divergent from 'interior legal assistance'.<sup>16</sup>

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<sup>11</sup> 2001/500/JHA Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, Official Journal L 182, 05/07/2001 1-2.p.

<sup>12</sup> 2003/577/JHA Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Official Journal L 196, 02/08/2003 45-55.p.

<sup>13</sup> 2005/214/JHA Council Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Official Journal L 76, 22/3/2005 16-30.p.

<sup>14</sup> 2006/783/JHA Council Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, Official Journal L 328 24/11/2006 59-78.p.

<sup>15</sup> *Fuchs, Helmut*: Bemerkungen zur gegenseitigen Anerkennung justizieller Entscheidungen. Zeitschrift für die gesamte Strafrechtswissenschaft 2004/2 368-371.p.; *Gleß, Sabine*: Zum Prinzip der gegenseitigen Anerkennung. Zeitschrift für die gesamte Strafrechtswissenschaft 2004/2 354-367.p.

<sup>16</sup> This legal instrument is used for example if the municipal court requests some procedural acts (in the criminal procedure) from the court of another town in the same country.



### Procedural assistance – restricted mutual recognition

A restricted form of the principle of mutual recognition is not unknown to the traditional institutional system of procedural assistance either. Procedural assistance has the most frequent occurrence among the forms of mutual legal assistance in criminal matters. In order to carry out the necessary procedural acts of criminal proceedings, assistance could be requested through procedural assistance. Such as questioning a witness, interrogating a suspect, executing search warrant, site-inspection, hearing of a forensic expert, delivery of document (etc). Many international multilateral agreements, treaties or declarations of reciprocity refer to procedural assistance – thanks to the long-existence of this legal institution. The Convention on Mutual Assistance in Criminal Matters (1959) of the Council of Europe has a dominant role among EU Member States as well but more and more details are regulated by EU norms, which means that special EU provisions enjoy precedent. The EU Convention of the 29<sup>th</sup> of May 2000 on Mutual Assistance in Criminal Matters<sup>17</sup> has entered into force on the 23<sup>rd</sup> of August 2005. According to the traditional general rule, *locus regit actum* has to be enforced, i.e. procedural assistance is executed under the legal provisions of the executing Member State. Due to a separate request, it is not excluded to use the legal provisions of the issuing Member State. The EU Convention turns away from this traditional principle and enforces *forum regit actum*: the procedural act requested by the procedural assistance has to be executed according to the wish (procedural law) of the requesting Member State. This is a restricted form of the principle of mutual recognition.

### *Mutual recognition in a substantive sense*

The development in EU law shows the international (European) headway of the principle *ne bis in idem*, which is laid down by Article 54 of the Schengen Convention<sup>18</sup>. With the integration of the Schengen acquis into the EU legal framework<sup>19</sup>, the European Court of Justice (ECJ) gained new competence concerning to the interpretation of the Schengen Convention including taking decisions on preliminary questions in connection to it.

<sup>17</sup> Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, Official Journal C 197 12/07/2000 3-23.p.

<sup>18</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal republic of Germany and the French Republic on the gradual abolition of checks at their common borders, on 19 June 1990.

<sup>19</sup> 1999/436/EC Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, Official Journal L 176, 10/7/1999 17–30.p.

As the ECJ found in the joined cases of Gözütok and Brügge<sup>20</sup>, the application of Article 54 *nowhere* in the Schengen Convention is made conditional upon harmonization or at the least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred. In those circumstances, the *ne bis in idem* principle necessarily implies that regardless of the way in which the penalty is imposed, the Member States have mutual trust in each others criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even if outcome of criminal procedure would be different if its own national law was applied.

It means that the final decision, concerning the same act, judged in other Member State has turned into a *non-discretionally obstacle of the criminal proceedings* in every Member State independent of the further contents.

The Lisbon Treaty upon the European Union recognizes (Article 6) the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted in Strasbourg, on 12 December 2007. The Treaty will come into force – after the ratification in all Member States – on 1 January 2009. The Article 50 of the Charta contains the general provision about the principle *ne bis in idem*: ‘no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’

### *Mutual recognition of evidences – mutual recognition of facts or legal attributes?*

The Commission introduced a proposal for a framework decision in 2003, which applies the principle of mutual recognition in connection with evidences (European Evidence Warrant)<sup>21</sup>. Once the proposal is adopted the European Evidence Warrant will provide a single, fast and effective mechanism for obtaining evidence and transferring it to the issuing state. It will not be necessary anymore to issue a prior freezing order. The draft framework decision applies to objects, documents or data obtained under various procedural powers, including seizure, production or search powers in any Member States.<sup>22</sup> The European Evidence Warrant should be used where the evidence is already directly avail-

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<sup>20</sup> Joined Cases C-187/01 and C-385/01 Criminal proceedings against Hüseyin Gözütok and Klaus Brügge/Gözütok and Brügge [2003] ECR I-1345, paragraph 32.

<sup>21</sup> Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters. COM(2003) 688. 14.11.2003.

<sup>22</sup> *Gazeas, Nikolaos*: Die Europäische Beweisanordnung – Ein weiterer Schritt in die falsche Richtung? Zeitschrift für Rechtspolitik 2005/1 18-22.p.



able in the executing State for example by extracting the relevant information from a register (such as a register of criminal convictions).<sup>23</sup>

It will result the Member States' mutual submission – which followed the expansion of the principle concerning the issues of the international cooperation in criminal matters – to be disappear, by giving shape to a proper *resistance*. It did not happen accidentally: the questions arises, what kind of conceptual motivations could be the grounds of such development? Before examining the different basic attitude of the Member States there is more need to analyze the principle of mutual recognition more theoretically.

### **The justification of the principle of mutual recognition in EU-law**

#### ***Judgementless method***

The principle of mutual recognition as it lays in its name is a method without value judgement and has essentially three factors. The first factor is the object of recognition; and the recognition is accomplished between the other two factors (remitter entity and receiver entity). The main point of the acceptance is that the receiver acknowledges (adopts) the object of recognition *as the remitter offers it* to him or as the remitter treats it. In the sphere of law it means the following: a figure of law is accepted by an entity – which is independent of the original issuing entity – in the scope and depth without any modification, as it is originated from the issuing entity. The principle contains an automatic recognition (without any change in substance or form of the legal figure), meaning that the remitter has the 'claim' that its legal product not will be changed. The receiver is the concrete Member State's law system (or the judicial authority), the objective of recognition – in the widest sense – is any legal product of criminal procedure (decisions, coercive measures, evidences), and the Member State's law, from where the legal product comes, is the remitter.

The principle of mutual recognition, as the topic in the focus of interest in EU law development, is restricted to interstate relation as the remitter and the

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<sup>23</sup> The European Evidence Warrant is not intended to be used to initiate the interviewing of suspects, taking statements, or hearing of witnesses and victims. Also the taking of evidence from the body of a person, in particular DNA samples, is excluded from the scope of the European Evidence Warrant. It is also not intended to be used to initiate procedural investigative measures which involve obtaining evidence in real-time such as interception of communications and monitoring of bank accounts. Nor is the European Evidence Warrant intended to be used to obtain evidence that can only result from further investigation or analysis. It could therefore not be used to require the commissioning of an expert's report. Nor, for example, could it be used to require an executing authority to undertake computerised comparison of information (computer matching) in order to identify a person.

receiver entities belong to *different* law-systems. But this interstate relation does not mean an international law context as the interaction does not take place between states themselves as bodies of their own sovereignty but between the concrete judicial authorities (only) representing states. One or two foreign elements appear during the carry out of national-framed criminal procedures: the accused or any of the witnesses resides abroad or the means of evidence (or seized objects) stays abroad. The enforcement of the criminal jurisdiction and the carrying out of a criminal procedure is effective in a national framework of law but national law becomes inadequate if a substantial factor of the procedure is to be found abroad. This foreign element should be made – also physically – admissible (international cooperation in criminal matters) and if it is admissible and present, it should be made compatible (procedure of exequatur) with the domestic law system. Namely, the legal product coming from a foreign legal system shows the characteristics of its own system which might cause unlawfulness during the implementation in another State, if these characteristics are not reconcilable. At this point appears the principle of mutual recognition which may replace the transformation's acts of internal compatibility.

The principle of mutual recognition as a judgementless method theoretically might work in connection with every single legal product of criminal procedure. The principle of mutual recognition is functional as it concentrates on using the legal product in question everywhere for the same reason and the same way as it was originally made. This means that it has to fulfill the same function in the receiver's frame of reference as in its own. The greatest problem of the principle of mutual recognition as a method in criminal law context is that the legal products (legal institutions functioning in one legal system) cannot be independent of their system they will always maintain – almost – the whole characteristics of their own legal system. Therefore the object of mutual recognition, the legal product itself will never be suitable for recognition, the recognition means necessarily the recognition of the entire other legal system.

The principle of mutual recognition could be completely effective also in this area that would really mean that criminal jurisdiction would make a unified geographical area in the European Union. There would be no conflicting legislation and the relation among the acting authorities would be ruled by traditional *internal* provisions for competence and jurisdiction. This is known as cosmopolitan jurisdiction expressed also by Franz von Liszt, the attitude of the states is described as 'your law is my law'<sup>24</sup>. Such a system is hold together by the real *constructive confidence* put in each other's (the Member State's) jurisdiction, but today's illusion is not suitable for this. That is why we have complaints filed by Member States on both sides of the procedure and the stage of legal theory

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<sup>24</sup> Franz von Liszt op. cit. 102.p.



referring to human rights deficits although. Each Member State is participant to the European Convention on Human Rights, the cases and the progressive burdening of the European Court of Human Rights also shows that the minimum standards laid down by the Convention are not guaranteed in practice. This also means that the recognition of a criminal law-product should mean also the recognition of the domestic procedural provisions with their immanent (or expressed or regulated) protection of human rights. But this aspect is not always acceptable for the different Member States with – in practice – different levels of human right protection.

### *Community law 'principle'*

The principle of mutual recognition originates in the European Court's jurisdiction, concretely in connection with the free movement of goods in the decision known as *Cassis de Dijon*<sup>25</sup>. As a follow up the principle of mutual recognition become *one of the most important regulative principles* of the Community law in order to move forward the fundamental freedoms. According to it, the idea<sup>26</sup> was born that the principle might be followed also in relation to criminal cooperation and criminal law integration in general. This is how we meet – similar to the free movement of goods – *the theory of the free movement of criminal decisions*. The main point of it is that in the territory of the European Union, in the 'united jurisdictional area', a legal decision made by a Member State's authority is qualified the same way, and it produces the same legal effect as in the legal system of the issuing Member State.

Under Community law, the principle of mutual recognition is an instrument for reaching the fundamental freedoms adopted by Community law; in details it means the achievement of Community citizen's economic freedom. The central element of mutual recognition in connection with free movement of goods, is the following: after a concrete good is legally put on the market in whatever Member States legally, it can circulate in all the other Member States. The object of mutual recognition is not the good itself (like a television, a cucumber or a wine), rather the Member State-regulation which lays down how to put the goods on the (common) market the first time. The other Member States recognize here the lawfulness of these rules, accept them and consequently they also accept the further free trade in the whole European Union. It is important to notion that the trade-provisions can vary in the Member States. Nevertheless, these internal norms first have to conform Community law requirements (TEC) and furthermore this conformity has a higher (supranational) control, performed

<sup>25</sup> 120/78 REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein.

<sup>26</sup> At the first time in the Conclusions of the European Council, Tampere (15-16 October 1999).

by the competences of the European Court of Justice. Accordingly, Member States' regulation, which define the rules of trade nationally, have to fulfill also external, objective – enforced the same way to all Member States – requirements. The Community law itself provides the frames: it pronounces the enforcement of the fundamental freedom and its possible limitation as well. If the rules of the Member States are between these two frames, they will always fulfill Community law requirements.

### *Free movement of decisions in criminal matters*

According to the mentioned Community law sense of mutual recognition, the object of the recognition is not the decision itself (since neither the goods are being recognized in relation to the free movement of goods) but rather the Member State's procedure leading to a lawful decision. The use of mutual recognition and the free movement of decisions in criminal matters would mean that if a decision is lawfully made then it could be executed (also) in all of the Member States. Nowadays it comes forward the following way: there are only certain decisions covered by mutual recognition, not all. The question rose naturally what could be the reason of this dual standard?

The process had started with the European Arrest Warrant but without letting each decision fall under the object of mutual recognition, rather simply stepping into this stage one by one. There is no confirmed contextual reason of this method since the concrete decision can not be more independent of the surrounding procedural and guaranteed rules, and not even less independent of the accused or third person's rights than the decisions not involved. There is a possibility to justify the mutual recognition of these decisions with the fact that the decisions were made by *judges*, meanwhile we presume lawfulness and contextual propriety. But why would one Member State's judge make a worse decision than the other? The question is still open. This is why not all the decisions passed by judges fall under mutual recognition. In my point of view the unsaid reason of this is that *the declared mutual confidence is still not complete*. It is only an illusion of confidence.

The community characteristics of mutual recognition could be enforced also for criminal decisions, if – similarly to the mutual recognition regarding goods – there would be an 'external' objective binding in all Member States legal substantial framework such as fundamental rights or other higher objectives. But this kind of framework or objective does not exist in this context: this system would so not extend the freedom of individuals, rather exclusively the freedom of the authorities (mostly imposing this burden on the individuals' freedom). This way *the method as such becomes the objective* which can not be acceptable. The common system of norms and its judicial control would neces-



sarily belong to a higher objective (or its framework). Since this is not fulfilled, the extension of mutual recognition to decisions in criminal matters (and the idea of their free movement) can not be preserved.

### *Free movement of evidences*

The vision of free movement of evidences makes the question more complicated. According to the conception of evidence-exchange, the new planned system would replace most part of the cooperation in procedural assistance. The strengthening of the principle of *forum regit actum* would stop and *locus regit actum* will step forward and as a further consequence a higher stage of cooperation too. But *what* could be actually recognized by the Member States with mutual recognition of evidence? Is it that the object is an evidence or it has validity as evidence?

*The conclusive force* and its probability can not be the object of mutual recognition, as it is a question of the firm believe of the judge. The question about a fact being a fact also can not be the object of mutual recognition since real things such as blood or a signature are the same in all the other Member States. What is left is *real fact appearing as an evidence*. This 'transformation' proceeding – during which the fact becomes evidence – is a legal one, the procedural rules of the state give the normative framework to the 'transformation'. If a fact appears in one Member State as an evidence than it (that this evidence exists) has to be recognized. In this case the receiver state receives the existence of the fact already as an evidence. But the same problem burdens this aspect of mutual recognition – almost expectedly. Namely, the evidence, as the output of the mentioned transformation process also wears the marks of the procedural regulation (for example if the individual guaranties were violated during the proceedings). Consequently, in a non-national context if the evidence needs to 'distributed' to another Member State of the European Union, the another State should accept automatically also the procedural rules of the other. While there are no objective strict standards<sup>27</sup> to define the procedural frames resulting 'distributable' evidence, an automatic recognition system would lead to the recognition of *every* procedural rules in the Member States. But such a confidence does not exist today between the Member States, mutual recognition can not work in this context adequately, until there is no (at least partially) common system of norms, contextual standards and judicial control.<sup>28</sup>

<sup>27</sup> The human rights standards of the ECHR (and Convention) are not enough in this field, as it binds only the separate Member States. the legislation of the European Union is not covered by this standards.

<sup>28</sup> To the development in this field see: Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union. COM(2003) 75. 19.2.2003.

It is cold comfort but there could be one aspect where the lack of contextual standard does not appear: the event when if transformation of the evidence from the evidence embodied in a real fact does not affect other person's rights. The application of the principle of mutual recognition is acceptable at this stage.

### **Breaking points**

#### ***The illusion of confidence***

The mutual confidence placed in other Member States' judicial systems as a principle is in an *ideal case* a declaration which defines an existing phenomenon and custom. Nowadays this is only an illusion. This illusion is followed by The European Union and its Member States, as they declared something, which is not real. It is understandable since on the present stage of integration – especially in connection with the regulation of the surrender procedure (and the system of the European Arrest Warrant) – also the theoretical foundation seemed to be necessary. But the illusion breaks at the point when the chance for unconditional recognition of other Member States' legal systems totally or partially becomes reality.

#### ***Forum shopping***

The principle of mutual recognition might easily let law enforcement authorities use forum shopping – without the several times mentioned (at least partial) common regulatory system and judicial control mechanism. Choosing the place for practicing jurisdiction might become a strategic decision on the basis of the place for the lowest intervention limits, i.e. it is the Member State with the lowest human rights' protection system. The fear for this could be felt, if we think of the aspirations for eliminating the parallel criminal procedure in connection with crimes crossing several Member States; actually with a decision settles finally the competent Member State.<sup>29</sup> The efficiency factor in connection with decision-making might lead to forum shopping.

### **Conclusion**

The principle of mutual recognition is a judgementless method which could be efficient in criminal matters. There are *two ways* to settle its basic conditions.

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<sup>29</sup> For a while by recommendations, criminal law enforcement authorities coming from Eurojust and Europol, and the already published green book of the Commission [Green Paper of the Commission on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings. COM(2005) 696 final, 23.12.2005]



*First*, when the confidence placed in other Member State' criminal jurisdiction is complete and real. Until this confidence is apparent, only the *other* way is open for the Member States; namely, an external, common system of norms and control – binding every Member State the same way (or at least partially) – is necessary to operate the principle of mutual recognition in an acceptable way. This system of norms could refer to requirements based on human rights or expressly to the rules laying down completely the procedure of evidence-recording.

The Member States (and also the European Union) did not choose any of the above mentioned ways. They opted for a *third* way which represents only an illusive confidence *and* the lack of common framework of control norms at the same time. This way can not be followed any more. Since the Member States in today's world are not matured enough for the first way, as the 27 Member States are not yet accustomed to each other, the jurisprudence has give a helping hand to support the second way. This means, that – being so much paradoxical<sup>30</sup> – to reach an untroubled and unburdened enforcement of the principle of mutual recognition, we have to provide a more stricter criminal law integration, approximation of laws or even the unification of law.

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<sup>30</sup> Sieber, Ulrich: Memorandum für ein Europäisches Modellstrafgesetzbuch. Juristen Zeitung 1997/8 369-380.p.